

**REAL ESTATE AGENCY
BEFORE THE REAL ESTATE COMMISSIONER**

IN THE MATTER OF:) **AMENDED PROPOSED ORDER**
)
DEBRA MITZEL,) OAH Case No.: 1203011
Respondent) Agency Case No.: 201202-070

This matter came before the Real Estate Commissioner to consider a Proposed Order issued by Administrative Law Judge Dove Gutman. After considering the record the Commissioner adopts the Findings of Fact and Conclusions of Law, but has modified the amount of the civil penalty imposed on Respondent as explained below.

HISTORY OF THE CASE

On September 17, 2012, the Real Estate Agency (REA or the Agency) issued a Notice of Intent to Levy Civil Penalty (Notice) to Debra Mitzel (Respondent). On September 30, 2012, Respondent requested a hearing.

On October 25, 2012, the Agency referred the hearing request to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing.

On February 15, 2013, the Agency issued an Amended Notice of Intent to Levy Civil Penalty (Amended Notice) to Respondent.

On February 22, 2012, a hearing was held at the Agency's offices in Salem, Oregon. ALJ Gutman presided. Senior Assistant Attorney General Raul Ramirez represented the Agency. Respondent represented herself. Aaron Grimes, investigator for the Agency, and Respondent both provided testimony. The record closed at the conclusion of the hearing.

ISSUES

1. Whether, between May 6, 2010 and April 5, 2012, Respondent engaged in unlicensed professional real estate activity.
2. Whether Respondent shall be assessed a civil penalty in an amount no less than \$11,100 and no greater than \$22,500.¹

¹ The Amended Notice states "no less than \$11,600 and no greater than \$23,500." (*Amended Notice*.) However, at the beginning of the hearing, the Agency reduced the penalty amount to "no less than \$11,100 and no greater than \$22,500." (*Opening statement of Mr. Ramirez*.)

3. Whether Respondent shall be required to immediately cease and desist from engaging in any professional real estate activity.

EVIDENTIARY RULING

The Agency's Exhibits A1 through A36 were admitted into the record without objection. Respondent's Exhibit R1 was excluded on the basis of relevance. Respondent withdrew Exhibit R2 from consideration.

FINDINGS OF FACT

Background information

1. Respondent was first licensed by the Agency on September 15, 1998, under the business name of Mountain States Management. (Ex. A6 at 2.)

2. On December 21, 2001, Respondent was licensed to engage in property management activity under the registered business name of Ashton Property Management. (*Id.*)

3. Ian and Laura Luft own a four-plex rental property located at 230 Kennell Avenue in Molalla, Oregon (the rental property). The Lufts live in Canby, Oregon. The Lufts are friends with Respondent and her husband. (Test. of Mitzel; Exs. A15, A16.)

4. During the period of 2004 through 2008, Respondent managed the rental property for Mr. Luft. Respondent was paid a management fee to provide the following property management services:

- Advertise the property for rent.
- Show the property to prospective tenants.
- Collect rent from tenants.
- Send out monthly statements.
- Reconcile statements.
- Manage the business and trust accounts.
- Arrange for cleaning and maintenance.
- Inspect the property.
- Evict tenants.
- Handle small claim actions.

(Test. of Mitzel; Ex. A21.)

5. On April 1, 2009, Respondent registered Jade Consulting, LLC, with the Secretary of State. (Ex. A7.)

6. On May 5, 2010, Respondent's license was revoked by the Agency. (Ex. A6.)

May 6, 2010 through April 5, 2012

7. Sometime after May 5, 2010, Respondent prepared a website for Jade Consulting, LLC. The website stated, in relevant part:

At Jade Consulting, we take care to provide our customers high quality services personalized for their unique needs. We are available to take your order 24 hours a day, 7 days a week. Our staff members are professional, courteous and efficient.

We provide a variety of services including:

Professional Property Management

Jade Consulting offers full service property management to include full background screening, customized rental contracts, inspections, evictions, etc. Specializing in smaller complexes. Owner holds all deposits and pays all bills so there is no confusion.

Consulting fees are based on the number of units managed.

Customized rental contracts for non clients

Customized rental contracts: \$54.95
Screening services: \$35.00

Eviction Services

Jade Consulting provides eviction services from beginning to lockout including scheduling re-keying of the doors and a final inspection report.

\$350.00 + \$75.00 per hour for trial should one take place.

If you have any questions concerning services, please don't hesitate to contact us.

(Ex. A11; emphasis added.) Respondent prepared the website in anticipation of getting her license back. Respondent paid a fee to activate the website. (Test. of Mitzel.)

8. Under Jade Consulting, LLC, Respondent created rental agreements for her friends and/or acquaintances. Respondent was paid on two occasions (dates unknown) for her services. Respondent is the only employee of Jade Consulting, LLC. (*Id.*)

9. At some point in time, Ms. Luft became extremely ill. Mr. Luft was unable to manage his rental property. (*Id.*) Respondent performed the following services for the Lufts for no compensation:

- On two or three occasions, including one in February 2012, Respondent posted a rental sign, advertising the rental property.
- On one or two occasions, Respondent showed the rental property to prospective clients.
- During the period of May 5, 2010 through October 5, 2010, Respondent prepared a tenant ledger for a tenant of the rental property.
- In October 2010, October 2011, and November 2011, Respondent prepared three demand letters for past due rent owed by tenants of the rental property.
- In December 2011 and January 2012, Respondent evicted two tenants of the rental property.
- On two occasions, Respondent deposited the rent from two tenants of the rental property into Mr. Luft's account.

(Test. of Mitzel; Exs. A18, A19, A20, A22-A36.)

11. Respondent's husband mowed the lawn of the rental property for no compensation. (Test. of Mitzel.) Respondent's son repaired the fence of the rental property for no compensation. (*Id.*)

12. If Respondent found a tenant to rent a unit at the rental property, Mr. Luft would "sometimes" pay Respondent a finder's fee (amount unknown). (*Id.*)

13. On two occasions, one in September 2011 and one on or about February 2012, Respondent and her husband cleaned a unit of the rental property for compensation. Respondent charged Mr. Luft \$25.00 per hour to clean, patch, and paint the units in preparation for rental. (*Id.*)

14. On or about February 2012, WG, a former tenant of the rental property, observed Respondent cleaning a unit at the rental property. WG told a local reporter, Jeff Goodman, that Respondent was performing property management activities without a license. Mr. Goodman subsequently contacted the Agency to report the matter. Mr. Goodman also published an article regarding Respondent's reported activities in the local newspaper. (Test. of Mitzel, Grimes; Exs. A1, A17.)

15. WG was evicted from the rental property for drug use, nonpayment of rent, and damage to the rental property. WG has at least one drug offense out of Washington County. (Test. of Mitzel, Grimes; Exs. A2, A13.)

Current information

16. Respondent is currently employed full-time at the McLaren Youth Correctional Facility (Facility). Respondent began working at the Facility in September 2008. (Test. of Mitzel.)

17. Respondent is no longer providing free services to the Lufts. (*Id.*)

18. Mr. Luft has hired someone to manage the rental property. (*Id.*)

CONCLUSIONS OF LAW

1. Between May 6, 2010 and April 5, 2012, Respondent engaged in unlicensed professional real estate activity.
2. Respondent shall be assessed a civil penalty in the amount of \$1500.00.
3. Respondent shall be required to immediately cease and desist from engaging in any professional real estate activity.

OPINION

The Agency contends that Respondent engaged in unlicensed professional real estate activity and should be assessed a civil penalty. As the proponent of this position, the Agency has the burden of proof. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

I. The violation

The Agency contends that Respondent engaged in unlicensed professional real estate activity during the period of May 6, 2010 through April 5, 2012, by creating rental agreements under Jade Consulting, LLC, and by providing services to the Lufts. Respondent contends that she was helping her friends and she did not receive compensation for the services she provided to the Lufts.

ORS 696.020 is titled "License required for individuals engaged in professional real estate activities; exception; rules" and provides, in pertinent part:

(2) An individual may not engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of a real estate licensee, within this state unless the individual holds an active license as provided for in this chapter.²

² "Nonlicensed individual" means an individual:

- (a) Who has not obtained a real estate license; or
- (b) Whose real estate license is lapsed, expired, inactive, suspended, surrendered or revoked.

ORS 696.010(13), in effect 2009 through 2011.

ORS 696.010(15), in effect 2009 through 2011,³ provides, in part:

“Professional real estate activity” means any of the following actions, when engaged in for another and for compensation or with the intention or in the expectation or upon the promise of receiving or collecting compensation, by any person who:

(a) Sells, exchanges, purchases, rents or leases real estate:

(b) Offers to sell, exchange, purchase, rent or lease real estate;

(d) Lists, offers, attempts or agrees to list real estate for sale;

(h) Engages in management of rental real estate;

(j) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

(Emphasis added.)

ORS 696.010(12), in effect 2009 through 2011,⁴ provides, in part:

“Management of rental real estate” means:

(a) Representing the owner of real estate in the rental or lease of the real estate and includes but is not limited to:

(A) Advertising the real estate for rental or lease;

(B) Procuring prospective tenants to rent or lease the real estate;

(D) Accepting deposits from prospective tenants;

³ The current version is set forth in ORS 696.010(14). There are no material differences between the former version and the current version.

⁴ The current version is set forth in ORS 696.010(11). There are no material differences between the former version and the current version.

(F) Charging and collecting rent or lease payments;

(G) Representing the owner in inspection or repair of the real estate;

(H) Contracting for repair or remodeling of the real estate;

(J) Advising the owner regarding renting or leasing the real estate;

(M) Offering or attempting to do any of the acts described in this paragraph for the owner of the real estate; or

(b) Representing a tenant or prospective tenant when renting or leasing real estate and includes but is not limited to:

(D) Accepting deposits or other funds from prospective tenants for renting or leasing real estate and holding the funds in trust for the prospective tenants;

Pursuant to ORS 696.010(15), professional real estate activity includes various real estate activities that are engaged in for compensation or for the expectation of compensation, including the management of rental real estate. An individual must be licensed to engage in professional real estate activity. ORS 696.020(2).

Jade Consulting, LLC

Sometime after May 5, 2010, Respondent prepared a website for Jade Consulting, LLC, in anticipation of getting her license back. The website set forth professional real estate activities for compensation. During the hearing, Respondent admitted that on two occasions (dates unknown) under Jade Consulting, LLC, she created rental agreements for her friends and/or acquaintances for compensation. Accordingly, on two occasions (dates unknown), Respondent engaged in professional real estate activity without a license. ORS 696.020(2).

Luft rental property

Activities for no compensation - Sometime after May 5, 2010, Ms. Luft became extremely ill and Mr. Luft was unable to manage his rental property. Respondent credibly testified that she provided the following services to the Lufts (her friends) for no compensation: Advertising the rental property; showing the rental property to prospective tenants; preparing a

tenant ledger for a tenant of the rental property; preparing three demand letters for past due rent owed by tenants of the rental property; evicting two tenants from the rental property; depositing rent from two tenants of the rental property into Mr. Luft's account; mowing the lawn of the rental property; and repairing the fence of the rental property.

The Agency contends that, more likely than not, Respondent was paid for the services she provided to the Lufts. However, the Agency failed to present any evidence that established that Respondent was compensated for the services she provided.

Janitorial services - On two occasions, one in September 2011, and one on or about February 2012, Respondent and her husband cleaned a unit of the rental property for compensation. Respondent charged Mr. Luft \$25.00 per hour to clean, patch, and paint the units in preparation for rental. Respondent provided janitorial services to Mr. Luft for compensation. Therefore, Respondent did not engage in professional real estate activity when she cleaned two units of the rental property for compensation.

Procuring tenants for a fee - During the hearing, Respondent admitted that if she found a tenant to rent a unit at the rental property, Mr. Luft would "sometimes" pay her a finder's fee (amount unknown). However, the Agency failed to present evidence that Respondent actually procured a tenant and was paid by Mr. Luft for that service during the relevant time period. Consequently, the Agency failed to meet its burden.

The Agency contends that WG told Mr. Grimes that she rented a unit from Respondent during the relevant time period. However, WG's statement to Mr. Grimes is unreliable hearsay.⁵ Moreover, even if WG's statement is true, the Agency failed to present evidence that Respondent was paid a finder's fee by Mr. Luft for procuring WG as a tenant of the rental property. As such, the Agency's argument is unpersuasive.

II. The penalty

The Agency contends that Respondent should receive a penalty for every 30-day period of time of unlicensed activity. Respondent contends to the contrary.

Former ORS 696.990, in effect 2009 through 2011,⁶ is titled "Penalties" and provides, in material part:

(4) Any person that violates ORS 696.020(2) may be required by the Real Estate Commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner of:

⁵ WG did not testify in the hearing. Her out of court statements were not subject to cross-examination. In addition, WG was evicted from the rental property for drug use, nonpayment of rent, and damage to the rental property. Moreover, WG has at least one drug offense out of Washington County. Therefore, WG's hearsay statements are not reliable.

⁶ There are no material differences between the former version and the current version.

(a) Not less than \$100 nor more than \$500 for the first offense of unlicensed professional real estate activity; and

(b) Not less than \$500 nor more than \$1,000 for the second and subsequent offenses of unlicensed professional real estate activity.

(5) In addition to the civil penalty set forth in subsection (4) of this section, any person that violates ORS 696.020 may be required by the commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner but not to exceed the amount by which such person profited in any transaction that violates ORS 696.020.

(9) For the purposes of subsection (4) of this section, any violation of ORS 696.020(2) that results from a failure of a real estate licensee to renew a license within the time allowed by law constitutes a single offense of unlicensed professional real estate activity for each 30-day period after expiration of the license during which the individual engages in professional real estate activity. A civil penalty imposed for a violation of ORS 696.020(2) that results from a failure of a real estate licensee to renew a license within the time allowed by law is not subject to the minimum dollar amounts specified in subsection (4) of this section.

As set forth previously, sometime after May 5, 2010, on two occasions (dates unknown) under Jade Consulting, LLC, Respondent created rental agreements for her friends and/or acquaintances for compensation thereby engaging in professional real estate activity without a license. ORS 696.020(2).

After reviewing the record in its entirety, I find that Respondent should pay \$500.00 for the first offense and \$1,000.00 for the second offense. ORS 696.990(4)(a), (b). Therefore, Respondent should be assessed a civil penalty in the amount of \$1,500.00 for engaging in professional real estate activity without a license.

The penalty imposed is higher than what the ALJ recommended because Respondent was licensed for several years before her license was revoked in 2010. Respondent therefore was aware of the Real Estate laws and the fact that she no longer had a license after 2010. The higher penalty is also justified because Respondent purposely set up Jade Consulting and its website after having her license revoked, openly offering services that are professional real estate activity. The weight of the evidence establishes that Licensee would not have set up the website if she wasn't anticipating to receive compensation at some point from the provision of the advertised services.

III. Cease and desist

The Agency contends that Respondent should be ordered to immediately cease and desist from engaging in any professional real estate activity.

ORS 696.020 provides:

(2) An individual may not engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of a real estate licensee, within this state unless the individual holds an active license as provided for in this chapter.

As indicated above, an individual may not engage in professional real estate activity without a license.

Respondent's license was revoked on May 5, 2010. Respondent is hereby ordered to cease and desist from engaging in any professional real estate activity until she is properly licensed by the Agency.

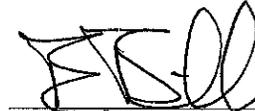
ORDER

For the foregoing reasons:

1. Respondent is hereby assessed a penalty in the sum of \$1500.
2. Respondent is hereby ordered to cease and desist from engaging in professional real estate activity unless she has a license from the Real Estate Agency.

Dated this 8th day of May, 2013

OREGON REAL ESTATE AGENCY



GENE BENTLEY
Real Estate Commissioner

NOTICE

This is the Real Estate Commissioner's Amended Proposed Order. If the Amended Proposed Order is adverse to you, you have the right to file written exceptions and argument to be considered by the Real Estate Commissioner in issuing the Final Order. Your exceptions and argument must be received by the 20th day from the date of service. Send them to:

Selina Barnes
Oregon Real Estate Agency
1177 Center St. NE
Salem OR 97301-2505

The Real Estate Commissioner will issue a Final Order, which will explain your appeal rights.

CERTIFICATE OF MAILING

On May 8th, 2013, the foregoing Amended Proposed Final Order in OAH Case No. 1203011, was mailed by First Class Mail to the following:

Debra Mitzel
PO Box 476
Molalla OR 97038-0476

Raul Ramirez
Senior Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301-4096

By:


Denise Lewis, REA Regulation Division